BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HEIDI N. AMACK Claimant	)	
VS.	)	
J. C. PENNEY COMPANY, INC. Respondent	)	Docket No. 1,039,340
AND	)	
AMERICAN HOME ASSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 30, 2008, preliminary hearing Order and the May 6, 2008, Order Nunc Pro Tunc entered by Administrative Law Judge Bryce D. Benedict. John J. Bryan, of Topeka, Kansas, appeared for claimant. Zachary A. Kolich, of Merriam, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant injured her knee when she twisted her body and her foot did not pivot on the carpeted flooring, causing unusual stress on her knee. Accordingly, the ALJ found that claimant was injured as a result of an accident that arose out of and in the course of her employment with respondent. Respondent was ordered to pay claimant temporary total disability compensation at the rate of $84.91 per week commencing December 10, 2007, until she has been certified as having reached maximum medical improvement or released to substantial and gainful employment. The issue regarding payment of medical bills was deferred to another hearing.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 30, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant was not injured in an accident that arose out of and in the course of her employment. Respondent argues that instead, claimant's accidental injuries occurred as the result of normal activities of day-to-day living. Accordingly, respondent requests the Board reverse the Order and Order Nunc Pro Tunc of the ALJ.

Claimant asserts that the ALJ correctly found that claimant's injury arose out of and in the course of her employment.

The issue for the Board's review is: Did claimant's injury result from an accident that arose out of and in the course or her employment or was it the result of the normal activities of day-to-day living?

FINDINGS OF FACT

At the time of her accident, claimant was 19 years old and worked for respondent as a sales associate. On December 9, 2007, she was standing on a carpeted floor at a cash register checking her schedule when a customer came up and asked her a question. Claimant hurriedly turned to her left toward the customer. In doing so, she felt her right knee go out. Claimant was unable to walk and was taken by wheelchair to respondent's office, where an accident report was filled out. Claimant called her mother, and her mother took her to the hospital. A MRI was performed, and claimant was diagnosed with a torn ACL.

Claimant had fallen several months before this incident and had injured her right knee. Her knee swelled up and was painful for two days, after which she had no more problems. She did not see a doctor as a result of the incident.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

---

[1] K.S.A. 2007 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

---

[3] *Id.* at 278.

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Hensley,*[4] the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

In *Anderson*,[5] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson,*[6] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding

---

[4] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[5] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. _ _ (2006).

> that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[7]

The Kansas Court of Appeals, in *Lietzke*,[8] stated:

> The evidence in this case clearly established that one of the hazard's [*sic*] of Lietzke's employment was prolonged standing necessary to perform his welding job. This prolonged standing caused or aggravated Lietzke's hip and groin injuries. Prolonged standing is not a normal activity of day-to-day living.

The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[9]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

The facts in this case more closely resemble *Johnson* than they do *Anderson*. However, the claimant in this case differs from the claimant in *Johnson* in an important way–she did not have a preexisting condition that "looks like she had had years of

---

[7] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[8] *Lietzke v. True-Circle Aerospace*, No. 98,463, unpublished Court of Appeals case filed June 6, 2008, slip op. at 20-21; see also *Heller v. Conagra Foods, Inc.*, No. 96,990, unpublished Court of Appeals case filed June 22, 2007.

[9] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2007 Supp. 44-555c(k).

degeneration and had some previous problems, and it was just a matter of time."[12] In this case, claimant is a healthy 19 year old.

Although standing, twisting and turning can be described as normal activities of day-to-day living, K.S.A. 2007 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holding in *Boeckmann.*[13]

The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[14] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[15] This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

This Board Member concludes that claimant's accident and resulting disability are directly attributable to her work. Although her injury may be an aggravation of a preexisting condition, it did not result from a personal risk. Claimant had been symptom free for months before this accident. Furthermore, there is no expert opinion testimony attributing the ACL injury suffered in claimant's accident at work to a preexisting condition. The act of twisting to help a customer was part of what claimant was expected to do by her employer. Claimant's injury resulted from that activity. There is no evidence that claimant's knee was such that any type of activity would have caused this injury. Therefore, claimant's accident arose out of the nature, conditions, obligations and incidents of her employment with respondent.

CONCLUSION

Claimant's right knee injury arose out of her employment. It did not result from normal activities of day-to-day living.

---

[12] *Johnson*, 36 Kan. App. 2d at 788.

[13] *Boeckmann*, 210 Kan. 733.

[14] *Id.* at 737.

[15] *Johnson* at 789.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that Administrative Law Judge Bryce D. Benedict's Order dated April 30, 2008, as modified by the Order Nunc Pro Tunc dated May 6, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2008.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Zachary A. Kolich, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge